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# Truth in the Iran-Contra Affair: Making the Constitution Work

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# *TRUTH IN THE IRAN-CONTRA AFFAIR: MAKING THE CONSTITUTION WORK; Philosophy of Law*

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## Body

**Philosophy of Law**

**Editor's note: This is the first part of a two-part series, which in turn is part of a larger work still in progress**.

BY THEIR OWN admission in the Iran-Contra hearings, Reagan administration officials, members of the executive branch, had made statements (sometimes under oath) to Congress shrewdly calculated to evade the legislative inquiry and mislead the inquirer. Yet, with a few exceptions, each of these misleading statements, taken alone, was literally true. Does such a strategy undermine the constitutional scheme of shared powers and checks and balances envisioned by the founders? Or does an emergency, that may justify a covert operation in support of American foreign policy also permit executive evasion of legislative oversight?

On Nov. 25, 1986, while briefing the Senate Intelligence Committee, Asst. Secretary of State Elliott Abrams was asked -- so we have the record clear -- whether he had any knowledge or indication that the Contras were receiving funds from Israeli or other Mideastern sources?

No, he replied, despite recently having solicited $10 million from the Sultan of Brunei.[1] He later defended that denial as truth: Brunei, although a mostly Moslem, oil-producing country, is located on the South China Sea.

Your approach on November 25, before the Senate Intelligence Committee, was that unless the senators asked you exactly the right question, using exactly the right words, they weren't going to get the right answers. Wasn't that the approach? challenged Mark Belnick, assistant Senate counsel of the joint House-Senate committee investigating the Iran-Contra affair.

That is exactly the correct description of what I did on that date,' Mr. Abrams readily conceded.

Therefore you could give this literally correct answer, despite the existence of the Brunei solicitation?

Literally correct and perhaps misleading.[2]

I did not authorize him to make false statements. I did think he would withhold information and be evasive frankly in answering questions. My objective all along was to withhold from the Congress exactly what the [National Security Council] staff was doing in carrying out the President's policy....As I've said before, I did not expect him to lie to the committee. I expected him to be evasive....[W]ith his resourcefulness, I thought he could handle it.[3]

The man sent to the Hill to dodge the Congress was Lt. Col. Oliver L. North, The speaker here, his boss, Rear Adm. John M. Poindexter, throughout the hearings, perhaps alone, steadfastly insisted that in this complex and dangerous world, shrewdly evading and misleading Congress was sometimes necessary and proper, but in any case it was not lying.

In letters drafted by Lt. Col. North, National Security Advisers Poindexter and Robert C. McFarlane had assured Congress that the National Security Council staff was complying with the letter and spirit of the Boland amendment. As enacted by Congress, the Boland amendment required that no funds available to

the Central Intelligence Agency, the Department of Defense **or any other agency** or entity of the United States Government **involved in intelligence activity** may be obligated or expended for the purpose of or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group or organization, movement or individual.[4]

Mr. McFarlane expressed his regret about his written assurances, but Rear Adm. Poindexter and Lt. Col. North defended them as true: Insofar as the Boland admendment (as they interpreted it) in no way applied to the National Security Council staff, they could not possibly have violated it.

Admiral, in saying that you are complying with the letter and spirit of law, when you mean that the law doesn't apply and that you are supporting the Contras, you do not consider that to be misleading Congress? demanded Arthur L. Liman, chief counsel to the Senate's Iran-Contra committee.

We did not -- **I have not said that we weren't helping the contras**. We were clearly helping the contras.[5]

Armed with literal truth, Rear Adm. Poindexter could claim he had complied with the Boland amendment and Elliott Abrams could insist he truly knew of no solicitation of a **Middle** Eastern country.

Can these truths also be lies? Can they be perjury?

RICHARD V. Secord's Lake Resources account, used to channel funds to the Contras, was hardly the first secret Swiss bank account later to become the object of a probe. Years before, in the course of a bankruptcy proceeding, bankrupt movie mogul Samuel Bronston too was questioned about his bank accounts:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months, in Zurich.

The company did have a Swiss bank account. But so, too, did Mr. Bronston have a personal Swiss bank account that he obscured from his creditors by his intentionally misleading reply. When, Mr. Bronston,

under oath, successfully diverted attention by creating an illusion with a literally truthful statement -- the company did -- had **he** lied?

The government prosecuted Mr. Bronston for perjury on the theory that in order to mislead his questioner he had unresponsively addressed his answer to the company's assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time.[6] The trial judge had instructed the jury that the basic issue was whether Mr. Bronston spoke his true belief, and that he could be convicted for an answer **not literally false but when considered in the context** in which it was given, neverthless constituted a **false** statement.

The majority of a divided 2d U.S. Circuit Court of Appeals, which affirmed Mr. Bronston's conviction, saw the question as whether an answer under oath, which is true -- but only half true -- can constitute perjury? Mr. Bronston's nonresponsive answer very clearly indicated his comprehension of what was called for by the question, said Circuit Judge James L. Oakes, for the majority. An answer containing **half** of the **truth** which **also** constitutes a **lie by negative implication**, when the answer is intentionally given in place of the responsive answer called for by a proper question is perjury. This must be so especially **in the context** of a [bankruptcy] examination which by its nature is a searching expedition, where the witnesses are the only parties who know the truth and are able to divulge it.[7]

For the trial and appellate courts in **Bronston v. U.S.**, lies include statements that individually correspond to reality but taken together in context present a false, misleading and deceptive portrait.

By this coherence view of truth, no single statement is true in isolation. We get at one truth only through the rest of truth,[8] A statement is true insofar as it implies and is implied by other statements that are true. Truth is a matter of degree. Some statements are partly true or mostly true. **Half-truths** are also half false. By this coherence view, in the context of the inquiries, Mr. Abrams, Rear Adm. Poindexter and Mr. Bronston had lied.

As Judge Oakes said, affirming Mr. Bronston's conviction:

A half-truth containing a lie, interjected by a knowledgeable and interested witness, may result in side-tracking the person inquiring or it may persuade the interrogator to proceed on another line of questioning.

Either consequence is contrary to the whole truth principle of the oath. The question here was not from out of the blue or on a collateral matter. The examination was for the very purpose known to the appellant -- of elicitng the kind of information this question called for.[9]

THE U.S. SUPREME Court, however, saw truth differently. Granting certiorari to consider a narrow but important question, [i.e.,]...whether a witness may be convicted of perjury for an answer under oath that is literally true but not responsive to the question asked and arguably misleading by negative implication, the court found Mr. Bronston's answers not guileless but also not perjurious. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry, the high court reasoned. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination. The perjury statute was not to be invoked simply because a wily witness succeeds in derailing the questioner -- so long as the witness speaks the literal truth.[10]

In reversing Mr. Bronston's perjury conviction, the Supreme Court had embraced literal truth. So had Mr. Abrams and Rear Adm. Poindexter; so too had Aristotle, who followed Plato's definition: To say of what is, that it is, and of what is not, that it is not, is true.[11] Combatting the sophists' view that it is impossible to speak falsely, because what is not, cannot be uttered, Plato and Artistotle held truth to consist in the correspondence of a statement with the things that are or the facts. How they correspond is not fully explained.[12]

For Bertrand Russell, too, truth consists in some form of correspondence between belief and fact.[13] In his essay, On the Nature of Truth, Mr. Pussell observes that a statement is true when a person who believes it believes truly, and false when a person who believes it believes falsely.[14] By this view, when Mr. Abrams denies there was a contribution from a Middle Eastern country he believes truly, because no Middle Eastern county had contributed that is, Brunei is not a Middle Eastern county. Furthermore, at the moment he testified, the money had not yet been received.

But for Sen. Bill Bradley, D-N.J., who asked the question, and for other members of the Intelligence Committee who heard his reply, Mr. Abrams' statement is correspondently false insofar as they (mis)understand it to assert that no money was solicited from countries that they would hold to include

Brunei. Mr. Russell does not clearly address a statement's truth for the speaker and simultaneous falsity for a listener under a correspondence view. Of course, by a coherence point of view, Mr. Abrams' half-truth was also half-false. It failed to cohere with other true statements: it was false in context. But for Aristotle and other correspondence advocates, a statement is either true or false, but never both.

Chief Justice Warren E. Burger, writing for a unanimous Supreme Court in **Bronston**, had sent a message. However calculated to mislead or deceive, an evasive but literally true statementa statement that corresponds to reality -- cannot be perjury. The responsibility of a lawyer **in an adversary setting** is to prove and press on, forcing the witness either to reveal the fact at issue or make a literally false statement under oath and later be subject to a perjury prosecution.

But, as Rep. Lee H. Hamilton, D-Ind., pointedly reminded Asst. Secretary of State Abrams, when exercising its oversight function in the conduct of foreign policy. Congress is a partner, not an adversary.

The object here is not to avoid a perjury indictment. The object is not to work to make your answer literally correct but nonetheless misleading. The object is to make the Constitution of the United States work.[15]

What standard of truth allows the Constitution to **work**? American pragmatists expound a theory of truth that focuses on a statement's practical consequences. True statements are those that place us in working touch with reality. All that the pragmatic method implies, said William James, is that truths should **have** practical consequences. The pragmatist posits a reality and a mind with ideas. What now, he asks can make these [ideas] true of that reality? Whereas others may content themselves with the vague statement that the ideas must correspond or agree; the pragmatist insists on being more concrete, and asks what such agreement may mean in detail. A pragmatist finds first that the ideas must point to or lead towards **that** reality and no other, and then that the pointings and leadings must yield satisfaction as their result.[16]

SEVERAL YEARS before it decided that a misleading statement shrewdly calculated to evade an inquiry could not be perjury as long as it corresponded to reality and was literally true, the U.S. Supreme Court rejected an advertisement that placed the viewing public in working touch with reality but was literally false.

In **Colgate-Palmolive v. FTC**,[17] the TV commercial under consideration purported to show a hand shaving sandpaper soaked in Rapid Shave. The cream could make sandpaper shaveable, but if shown on television, sandpaper would appear like cardboard, so the ad agency had substituted plexiglass covered with sand. The 2d U.S. Circuit Court of Appeals had supported the advertisement as an accurate portrayal of the product's attributes. But the Supreme Court, in a decision by Chief Justice Earl Warren, reversed, holding it false, misleading, and deceptive to claim to demonstrate something that did not literally correspond to realityi.e., a hand shaving sandpaper.

The majority's literalist view, as Justice John M. Harlan pointed out in his dissent, would permit an advertiser to exploit the fact that white shirts in a studio appear gray to a TV viewer, by demonstrating a white shirt washed in a competitor's detergent, holding it up for the viewer to judge. That would be literally true, but coherently falsefalse in context. It would be pragmatically false -- not placing the shopper who relied on the demonstration in working touch with reality.

Similarly, Black's Law Dictionary defines a true copy pragmatically: it does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it.[18]

The white shirt shows a statement can be literally true yet false. The true copy shows a statement can be literally false, yet true. Have you been to Grandma's recently? asks one sister, who has never visited. The other, who has averaged visits twice a day for 10 days, responds: A million times in the past week. That answer too, is literally false yet coherently pragmatically true.

If truth is literal, consisting of some form of correspondence between statement and fact, it is true that Mr. Bronston's company **did** have a Swiss bank account; the United States did not solicit aid for the Contras from a **Middle** Eastern country. The Boland amendment, if it couldn't be violated, obviously wasn't violated. From a pragmatic perspective, however, neither Mr. Bronston's, Mr. Abrams' nor Rear Adm. Poindexter's statements placed the recipients in working touch with reality.

**Editor's note: Next week Mr. Blecker will conclude by evaluating the standard of truth necessary to make the Constitution work**.

1. Transcript of proceedings before the Senate Select Committee on Intelligence at 11 and 12. A little later Mr. Abrams added that we never tried to raise money from any Middle Eastern sources largely because they [didn't] even know where Central America is.

2. Cong. Quarterly (1987) at 1165.

3. Ibid. at 1677.

4. The amendment as read aloud to the committee by its author, Rep. Edward P. Boland, D-Mass. Cong. Quarterly at 1007.

5. Cong. Quarterly at 1675. Emphasis added.

6. Bronston v. U.S., 409 U.S. 352 (1973).

7. U.S. v. Bronston, 453 F.2d 555. Emphasis added.

8. William James, The Meaning of Truth. at 214. For a classic statement of this coherence view, see Quine. Two Dogmas of Empiricism, in From a Logical Point of View at 42-46.

9. U.S. v. Bronston, supra note 7.

10. Bronston v. U.S., supra note 6.

11. Aristotle's Metaphysics 1011b26 ff. Plato's view of correspondence truth, which Aristotle followed, is stated in the Sophist (240e)cf. F.M. Cornford's discussion in Plato's Theory of Knowledge at 309-311.

12. W.K.C. Guthrie, A History of Greek Philosophy Vol. 3 at 218.

13. B. Russell, Problems of Philosophy at 121.

14. Ibid. at 147-159.

15. Cong. Quarterly at 1204.

16. W. James, The Meaning of Truth at 52 and 191.

17. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 (1965). Cf. Blshin and Stone's Law, Language & Ethics at 300-345 for an extended discussion of the case and a probing look at clashing standards of truth.

18. Black's Law Dictionary (4th ed.) at 1680.

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